IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 10-00320-12-CR-W-DGK
	)	
DESHAUN L. CERUTI,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT DESHAUN L. CERUTI'S MOTION TO SEVER

The United States of America, by Beth Phillips, United States Attorney, and the undersigned Assistant United States Attorney, both for the Western District of Missouri, respectfully submits this response to the defendant's Motion to Sever (doc. 268).

I. THE GENERAL LAW

Rule 14, Federal Rules of Criminal Procedure, governs the severance of defendants in a single indictment. A motion for severance is addressed to the discretion of the trial court. *Zafiro v. United States*, 506 U.S. 534, 541 (1993); *United States v. Shivers*, 66 F.3d 938, 939 (8th Cir.), *cert. denied*, 516 U.S. 1016 (1995). The United States Supreme Court has held that severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 538.

Where the evidence in each set of counts is mutually admissible to show the defendant's motive, intent, and pattern of criminal behavior, refusal to sever is proper. *United States v. Provost,* 237 F.3d 934, 938 (8th Cir. 2001); *Running Horse,* 175 F.3d 635, 637; *United States v.*

Brooks, 174 F.3d 950, 957 (8th Cir. 1999). Since the evidence against the defendant is not only mutually admissible but necessary, severance would be a tremendous waste of judicial resources.

While Federal Rule of Criminal Procedure 14 does permit severance where joinder will result in unfair prejudice, "whether or not prejudice occurs depends primarily on whether the jury could compartmentalize the evidence against each defendant." *United States v. Nevils*, 897 F.2d 300 (8th Cir.), *cert. denied*, 498 U.S. 844 (1990). The roles played by the various defendants in this case, as described in the indictment, are sufficiently distinct to preclude prejudice from spillover. The standard instructions to the jury to compartmentalize the evidence against the defendants should be more than sufficient in this case. Rule 14 even countenances some prejudice to a defendant from a joint trial, and severance is not required simply because a defendant might have a better chance of acquittal in a severed proceeding. *United States v. McConnell,* 903 F. 2d 566, 571 (8th Cir. 1990), *cert. denied*, 499 U.S. 938 (1991); *United States v. O'Meara,* 895 F. 2d 1216, 1218-1219 (8th Cir. 1990), *cert. denied*, 498 U.S. 943 (1990).

The test for severance in the case of disparity in evidence is whether the proof against an individual defendant's co-defendants is far more damaging, and thereby denies him a fair trial. Where the potential for a prejudicial "spillover" in evidence does exist, instructions to the jury to compartmentalize the evidence are generally sufficient to cure any conflicts in the weight of the proof. *United States v. Davis*, 882 F.2d 1334, 1340 (8th Cir. 1989). There is no requirement in joint trials that the evidence of each defendant's culpability be quantitatively or qualitatively equivalent." *United States v. Jones*, 880 F.2d 55, 63 (8th Cir. 1989)(*citing*, *United States v. O'Connell*, 841 F.2d 1408, 1432 (8th Cir.), *cert. denied*, 487 U.S. 1210 (1988)).

Where defendants are joined in a conspiracy trial, even a gross disparity in evidence does not necessarily require a severance, since the government is entitled to prove the entire scope of a conspiracy even in a severed trial; the proof would not be restricted to establishing the limited involvement of the severed defendant. *United States v. Haldeman*, 559 F.2d 31, 72 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 1977; *accord*, *United States v. Gutberlet*, 939 F.2d 643 (8th Cir. 1991); *United States v. Kindle*, 925 F.2d 272, 277 (8th Cir. 1991); *United States v. Knife*, 592 F.2d 472, 480 (8th Cir. 1979).

II. CO-DEFENDANT TESTIMONY

Severance requested on the ground that a defendant wants to call a co-defendant as a witness should be denied, unless the defendant shows that the co-defendant is likely to testify at a separate trial and the testimony would exculpate him. See *United States v. Wofford*, 562 F.2d 582, 586 (8th Cir. 1977); *United States v. Graham*, supra, 548 F.2d at 1311 & n. 9. A defendant is not entitled to severance on the weight of an "unsupported possibility" that a co-defendant's testimony might be forthcoming at a separate trial. *United States v. Graham*, supra, 548 F.2d at 1311 & n. 9. The defendant's speculative assertions about whether co-defendant Juan Marron will or will not testify in his defense are insufficient to justify severance[1]. He does not establish by affidavit or otherwise that his co-defendant will, in fact, testify and provide exculpatory evidence, but that such an opportunity will be lost because of a joint trial. His pure speculation as to possible exculpatory testimony from a co-defendant is insufficient to demonstrate the "clear" or "substantial" prejudice required for severance under Rule 14. *United States v. Blum*,

[1]While Defendant amended his motion concerning his assertion that Marron was willing to testify, it was unclear whether that amendment was intended to delete all argument by the defendant regarding Marron testifying.

65 F.3d 1436, 1444 (8th Cir. 1995), *cert. denied*, 516 U.S. 1097 (1996)(defendant seeking separate trial must show testimony adduced from co-defendant at separate trial would be "substantially exculpatory").

III. CONCLUSION

"The presumption against severing properly joined cases is strong." *United States v. Delpit,* 94 F.3d 1134, 1143 (8th Cir. 1996). For the reasons set forth herein, the defendant has failed to overcome this strong presumption because he has failed to show that he will suffer "clear" or "substantial" prejudice in a joint trial with his co-defendants. Accordingly, the defendant's Motion for Severance should be denied.

Respectfully submitted,

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By: */s/ Bruce Rhoades*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on July 11, 2011, to the Electronic Filing System (CM/ECF) of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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